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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LA INVESTMENT et al., Plaintiffs and Respondents, v. ROSA BANUELOS et al., Defendants and Appellants.	B260151 (Los Angeles County Super. Ct. No. BC544662)

APPEAL from an order of the Superior Court of Los Angeles County, Barbara M. Scheper, Judge. Affirmed in part, reversed in part, and remanded with directions.

Erik Johnson and the E. Johnson Law Firm for Plaintiffs and Respondents.

Richard L. Spix for Defendants and Appellants D. Elizabeth Martin and Law Office of Spix & Martin.

D. Elizabeth Martin for Defendants and Appellants Richard L. Spix and Law Office of Spix & Martin.

Rosa Banuelos, in pro. per., for Defendant and Appellant.

Defendants and appellants Richard L. Spix (Spix), D. Elizabeth Martin (Martin), Law Office of Spix & Martin (Spix & Martin) (collectively, the Attorney Defendants) and Rosa Banuelos (Banuelos) (sometimes collectively referred to as Banuelos or defendants) appeal an order denying their special motion to strike a complaint for malicious prosecution and defamation filed by plaintiffs and respondents LA Investments, LLC, a California limited liability company (LAI), 218 Properties, LLC, a California limited liability company (218 Properties), R22, Inc., a Delaware corporation d/b/a Star Management (R22), and Peter Starflinger (Starflinger) (sometimes collectively referred to as LAI or plaintiffs).[1]

With respect to the malicious prosecution claim, we conclude the trial court properly determined plaintiffs met their burden to establish a reasonable probability of prevailing thereon.

As for the defamation claim, the trial court erred in finding that the movants failed to meet their initial burden of establishing the cause of action arose out of their protected activity; we conclude the defamation claim did arise out of defendants' protected activity and that plaintiffs failed to show they were capable of prevailing on that claim.

Therefore, the order denying the special motion to strike is reversed in part and remanded with directions to grant the motion as to the defamation claim, and is otherwise affirmed.

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[1] The order denying the special motion to strike is appealable. (Code Civ Proc., § 425.16, subd. (*i*), § 904.1, subd. (a)(13).)

All further statutory references are to the Code of Civil Procedure, unless otherwise specified.

FACTUAL AND PROCEDURAL BACKGROUND

I. *Events leading up to the prior action.*

On June 26, 2010, Banuelos entered into a contract to sell her mobile home in Park Granada Trailer Lodge (Park Granada) to Rosa Rodriguez (Rodriguez) for $55,000. 218 Properties owns Park Granada and LAI owns 100 percent of the membership interest in 218 Properties. R22 is the property manager for Park Granada and Starflinger is R22's agent.

On June 28, 2010, Rodriguez submitted an application for residency at Park Granada as a potential purchaser of Banuelos's mobile home. The application included paystubs showing monthly gross income of $4,000; however, Rodriguez's credit report showed that she owed $5,112 per month in loan payments. On July 2, 2010, counsel for 218 Properties wrote Rodriguez asking for the following additional information in support of her application: (1) a schedule of her real estate; (2) a copy of the most recent mortgage statement for each of her mortgage loans; (3) a schedule of gross income, expenses and net income for each rental property she owned; (4) verification of funds to complete the purchase; and (5) a statement that Rodriguez intended to reside in the subject mobile home.

Rodriguez did not respond to the letter and, on July 7, 2010, she exercised her right to cancel the purchase because she did not want to provide the requested documents. On January 10, 2011, a new buyer made an offer to purchase Banuelos's mobile home for $51,000, which Banuelos accepted. R22 approved the new buyer's application for residency. The sale closed on February 28, 2011.

II. *The prior action; judgment for defendants following motion for summary judgment.*

Banuelos filed the original complaint in the underlying action on July 20, 2010. She sued 218 Properties, LAI, R22 and Starflinger, and alleged, inter alia, causes of action for declaratory and injunctive relief, statutory violations, interference with contract and with economic advantage, intentional and negligent infliction of emotional distress, and negligence. Demurrers and three amended complaints followed.

LAI and its codefendants answered the operative third amended complaint and then moved for summary judgment. R22, 218 Properties, and Starflinger argued that summary judgment was proper because the request for further documentation from Rodriguez was reasonable and permitted under Civil Code section 798.74. LAI argued that, as a member of a limited liability company, it was immune from liability for 218 Properties' actions. In opposition, Banuelos argued that LAI approved the residency applications of prospective mobile home purchasers who were friends and relatives of Starflinger, while arbitrarily refusing to approve the applications of other prospective purchasers. LAI replied and filed evidentiary objections.

The trial court granted summary judgment as to each moving defendant, and sustained 125 of their evidentiary objections. The court held that summary judgment was proper as to 218 Properties, R22, and Starflinger because Banuelos's separate statement was deficient. The court also ruled that the undisputed evidence established that LAI was not liable for the acts of 218 Properties, and that Starflinger was not liable for the acts of R22. The court further found that each cause of action failed on the merits on the following grounds: (1) as to the cause of action for violation of Civil Code section 798.74 and the derivative negligence claim, the undisputed evidence showed that Rodriguez cancelled her purchase of Banuelos's mobile home because she did not want to respond to the requests for further information, and that those requests were objectively reasonable; (2) as to the intentional interference with contract cause of action, it was undisputed that Rodriguez exercised her contractual right to cancel the purchase and, furthermore, the moving defendants were not strangers to the contract; (3) as to the interference with economic advantage cause of action, the undisputed evidence showed that the interference was not wrongful, and the requests for additional information were objectively reasonable; and (4) as to the intentional infliction of emotional distress cause of action, the undisputed evidence showed that LAI did not engage in extreme or outrageous conduct and Banuelos did not suffer severe emotional distress.

Banuelos appealed. This court affirmed. (*Banuelos v. 218 Properties, LLC, et al* (Sept. 3, 2013, B241645) [nonpub. opn.] (*Banuelos I*).) We rejected Banuelos's

contentions challenging the trial court's sustaining of demurrers to her causes of action for declaratory and injunctive relief, retaliation, and bad faith. We held, inter alia, "the defendants were well within their rights in demanding that the prospective purchaser located by [Banuelos] provide satisfactory evidence of an ability to pay the required park rent and charges. Civil Code section 798.74 allows park owners to refuse to approve mobile home purchasers for residency based on their 'lack of ability to pay park rent and charges.' " (*Banuelos I*, slip opn., p. 9.) We also rejected Banuelos's contention that the trial court erred in striking her alter ego allegations and in granting summary judgment. With respect to the grant of summary judgment, *Banuelos I* explained: "[Banuelos's] arguments improperly rely on evidence to which objections were sustained. However, [Banuelos] does not challenge the court's rulings sustaining defendants' objections to this evidence. As a result, any issues concerning the correctness of the court's evidentiary rulings have been waived and we consider all such evidence to have been properly excluded. [Citation.] [¶] In addition, [Banuelos] does not address the numerous alternate bases for the trial court's rulings, including the court's conclusion that her separate statement was deficient and that [LAI] was not liable for the acts of 218 Properties. Therefore, [Banuelos] has failed to show that summary judgment was improper . . . ." (*Banuelos I*, slip opn., p. 12.)

III. *The instant action.*

A. *The complaint.*

On May 5, 2014, six months after the issuance of the remittitur in *Banuelos I*, LAI, 218 Properties, R22, and Starflinger filed the instant action against Banuelos and the Attorney Defendants, alleging causes of action for malicious prosecution and defamation.[2]

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[2] The contention in Banuelos's reply brief that the malicious prosecution action is time-barred is meritless. "Pursuant to the "start/stop" computation refined by this court in *Rare Coin Galleries, Inc. v. A-Mark Coin Co., Inc.* (1988) 202 Cal.App.3d 330 (*Rare Coin*), a cause of action for malicious prosecution accrues upon entry of judgment in the underlying action in the trial court. (*Id.* at pp. 334-335.) The statute of limitations begins to run upon accrual and continues to run until the date of filing a notice of appeal. (*Id.* at

The complaint alleged in relevant part: the prior action, initiated by Banuelos, who was represented by the Attorney Defendants, was terminated in LAI's favor. Banuelos and her counsel lacked probable cause to initiate and prosecute the prior action, no reasonable attorney would have thought the claims were legally tenable, and there was a complete failure to investigate the facts before bringing suit. The prior action "was predicated on the charge that [LAI and others] acted in concert to unreasonably, intentionally, and wrongfully refuse the transfer of mobile homes to independent third parties as part of a scheme to force the owners to sell their homes to [LAI and others] or their proxies." Had Banuelos and her counsel "conducted any investigation whatsoever, they would have discovered that there was only one occasion – which occurred more than five years earlier, before Plaintiffs 218 [Properties], LAI, and R22 even had any involvement with Park Granada – where the sale of a mobile home to a prospective third party buyer was turned down before it was sold to an alleged 'proxy' of Plaintiff Starflinger." Further, Banuelos and her counsel acted with malice, as evidenced by, inter alia, derogatory comments about Starflinger in the presence of others. Finally, the cause of action for defamation was predicated on a June 2013 statement by Martin, in the presence of others, that Starflinger had been sued by the SEC for securities fraud. "This statement was . . . indisputably false, as . . . Starflinger has never been sued by the SEC for securities fraud." Further, said statement was defamatory per se and was not privileged because it was not made in the course of a judicial proceeding.[3]

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p. 335.) The statute is then tolled during the pendency of the appeal because the plaintiff cannot truthfully plead favorable termination of the prior action, which is an element of the malicious prosecution cause of action. At the conclusion of the appellate process, that is, when the remittitur issues, the statute of limitations recommences to run. (*Id*. at pp. 335-336.)" (*Roger Cleveland Golf Company, Inc. v. Krane & Smith* (2014) 225 Cal.App.4th 660, 668, disapproved on other grounds by *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1239.) Thus, the statute of limitations for the malicious prosecution action was tolled during the pendency of *Banuelos I*.

[3] In addressing the viability of the defamation claim, Banuelos contends that a statement by Martin characterizing Starflinger as a "jerk" was mere hyperbole and not actionable. This argument is irrelevant because the defamation claim is predicated on

B. *Special motion to strike*.

One month after LAI filed the instant action, the Attorney Defendants filed a special motion to strike. Banuelos later filed a joinder therein.

The motion asserted LAI could not prevail on the malicious prosecution claim because the facts known "as of the date of filing" of the underlying lawsuit established probable cause as a matter of law.[4] The moving papers asserted there was objectively reasonable evidence of probable cause to initiate Banuelos's lawsuit, citing "the boastful disparate treatment where [LAI and its] proxies [were] not required to meet the same terms as the prospective purchasers" of Banuelos's property. According to Banuelos's supporting declaration, Starflinger told her listing agent, Harry Madera, that he "wasn't going to make my sale easy, and that my son would never be allowed [to] sell his coach without moving it out of the park." The motion also argued that LAI could not establish the element of malice, because Banuelos's complaints about illegal park rules, her testimony before the city, assisting in the prosecution of claims by other residents, and organizing the residents in a residents' association, could not establish malice as a matter of law. The moving papers also asserted Banuelos had a complete defense because she acted on the advice of counsel in bringing the underlying action.

As for the defamation claim, the motion contended the statements relating to Starflinger's credibility were not defamatory, and in any event, the litigation privilege was an insurmountable obstacle to the defamation claim.

C. *Opposition to special motion to strike.*

In opposition, LAI argued a lack of probable cause can be established by showing either that the prior action was initiated without probable cause, or that it continued to be

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Martin's assertion that Starflinger had been sued by the SEC for securities fraud, not on Martin's remark that Starflinger was a "jerk."

[4] It is settled that malicious prosecution includes "continuing to prosecute a lawsuit discovered to lack probable cause." (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 973 (*Zamos*).) Therefore, the moving parties' focus on the facts they allegedly knew at the inception of the underlying lawsuit to establish probable cause was overly narrow.

prosecuted after Banuelos learned it was not supported by probable cause. Irrespective of whether Banuelos could show probable cause to initiate the prior action, the evidence showed Banuelos chose to continue the action after knowing that probable cause was lacking. In a separate action filed by Banuelos's son, Kevin Banuelos (Kevin), against LAI (the *Kevin* action), in which he alleged that LAI failed to approve applications for outside buyers as part of a bad faith scheme, the only evidence in support of this theory was a five-year-old case where one seller had difficulty finding a buyer, coupled with LAI's denial of Kevin's application. "Later in that case, [Kevin] filed a motion for preliminary injunction against the Park, largely supported by a declaration of [Rosa Banuelos] suggesting that a prospective buyer of her mobile home canceled the sale because the Park had sent her a letter requesting additional documentation in support of her application." However, the evidence showed the prospective buyer had documented only $4,000 per month in gross employment income while her credit report indicated over $5,000 per month in debt service obligations. Although the Park's written income qualification criteria allowed a maximum debt-to-income ratio of 41 percent, the prospective buyer's ratio was over 125 percent.

"Based on the application, the Park would have been well within its rights to simply decline the application; but rather than declining it, the Park asked for more information it hoped might enable the buyer to qualify so her application could be approved. This evidence was never disputed or contradicted, and no reasonable attorney would have continued the action in the face of such evidence. Yet Defendants aggressively continued the litigation for more than three years, all the way to the Court of Appeal, costing Plaintiffs nearly $200,000 in attorney fees."

LAI further contended it could show Banuelos and the Attorney Defendants acted with malice. LAI cited disparaging statements made by the Attorney Defendants throughout this controversy, such as calling Starflinger a "jerk," accusing him of "stealing from people," telling counsel "I don't like your client," and falsely accusing Starflinger of having been sued for securities fraud. LAI also argued that Banuelos's invocation of the advice of counsel defense was premature, because advice of counsel is

an affirmative defense that must be pled and proven, and is outside the scope of the issues to be considered at this stage of the proceedings.

With respect to the defamation claim, LAI argued the defamatory statements were not protected by the anti-SLAPP statute. Further, the defamatory statements were not shielded by the litigation privilege because they were not made in a judicial proceeding, were not made to party litigants, and were not logically related to the prior action or made to achieve the objectives of the litigation.

D. *Trial court's ruling*.

On October 17, 2014, the trial court heard the matter and took it under submission. Thereafter, the trial court issued a written ruling which provided:

Banuelos's reply papers, which were required to be filed and served by October 9, 2014, were not filed or served until October 14, and therefore were disregarded. Further:

"On July 20, 2010 defendant Rosa Banuelos, represented by defendants Spix and Martin, filed a complaint against plaintiffs herein . . . . The gravamen of defendants' complaint was that . . . the owners of Park Granada Trailer Lodge, engaged in a pattern and practice of unreasonably withholding approval of new tenant applications which in turn interfered with the ability of current tenants to sell their mobile homes. In particular, defendants alleged that plaintiffs interfered with Rosa Banuelos's sale of her mobile home to Rosa Rodriguez by requesting additional financial information from Rodriguez and falsely informing Rodriguez that the park was seeking a permit to convert to condominiums. In addition, defendants made allegations accusing plaintiffs of including illegal and unconscionable terms in their leases and promulgating unlawful park rules and regulations. Ultimately, all of Banuelos's claims were eliminated on demurrer and then summary judgment. On September 3, 2013, the trial court's rulings were affirmed on appeal.

"In the instant action, plaintiffs claim that defendants brought and maintained the prior action without probable cause and with malice. In particular, plaintiffs have submitted evidence that shortly after the prior action was filed, plaintiffs filed documents in a pending action brought by Kevin Banuelos (who was represented by defendants Spix

and Martin) demonstrating that they did not improperly interfere in the sale to Rosa Rodriguez. Plaintiffs submitted Rodriguez's application along with her credit report to demonstrate that they properly sought additional information from Rodriguez to determine whether she would have the financial wherewithal to pay the monthly rent and that Rodriguez chose to cancel the sale of the mobile home rather than produce the additional information. Banuelos was able to sell her mobile home not long thereafter to another purchaser.

"In spite of this, defendants argue that they had probable cause to continue the prior action. Defendants argue that they had evidence demonstrating that friends of plaintiff Starflinger and entities allegedly associated with him or the other plaintiffs were given special treatment when applying for a tenancy and were not required to supply the same financial or other information as others and were not required to follow the same rules as other applicants. Defendants did submit evidence demonstrating that in 2005 an acquaintance of Starflinger, Dean Raynor, was approved to purchase space 5 after nine other applications dating back to 2003 were disapproved. Defendants offer no evidence to establish the basis for those decisions or to dispute plaintiffs' reasons for the refusal. Defendants also fail to offer any evidence to demonstrate that those other buyers were subjected to different requirements than the successful buyer. The decisions relating to space 5 were made by prior owners of the park so defendants' allegations in this regard are of questionable relevance in any event. [¶] . . . [¶]

"Defendants assert that Rodriguez was told the park was seeking a permit from the city council to convert to condominiums when in fact the city council had already refused the park's permit. But the evidence established that the park was preparing an application for a writ of mandate to overturn that decision and planned to continue the effort to obtain approval for a conversion. Thus, the information supplied to Rodriguez properly informed her of the park's intentions going forward. Furthermore, there is and was no evidence that this information played a role in Rodriguez's decision to cancel the purchase . . . .

"Based on the foregoing, it appears to the court that the only evidence defendants had in support of continuing their action against plaintiffs was a single sale from 2005 that predated the ownership of the park by these plaintiffs, a statement allegedly made by plaintiff Starflinger to a third party to the effect that he was not going to make it easy for defendant Banuelos to sell her mobile home, and a February 2011 jury finding in an unlawful detainer case brought by plaintiffs against Kevin Banuelos [(the eviction action)]. Defendants supplied no transcripts of testimony in that action or other evidence in support of the jury's findings that plaintiff herein, 218 Properties, unreasonably refused to approve Kevin's tenancy, discriminated against Kevin and retaliated against him.

"Defendants offered absolutely no evidence or authority to support any of their claims regarding allegedly illegal lease terms or park rules and regulations or to suggest that defendant Banuelos suffered any injury or damage as a result thereof. Thus the court is satisfied that the plaintiffs' evidence, if believed by a jury, would support a finding that the prior action was brought and maintained without probable cause. Furthermore, plaintiffs' evidence supports an inference of malice based on defendants' initiation of the prior action without conducting any meaningful investigation, maintaining the prior action through multiple successful demurrers and a motion for summary judgment despite evidence refuting the basis of their lawsuit, and making defamatory statements about plaintiffs throughout the entire history of their interactions."

With respect to the defamation claim, the trial court stated:

"The second cause of action for defamation is premised on plaintiffs' allegation that 'Defendants have consistently expressed their personal animosity and disregard for Plaintiffs, and have repeatedly made defamatory statements against Plaintiffs in the presence of third parties. As a specific example, on or about June 2013, Defendant Martin accused Plaintiff Starflinger of being 'sued by the SEC for securities fraud'. Defendant Martin made this statement in the presence of other third parties, including but not limited to, Douglas Beck, Kevin Banuelos, and a court reporter.' [Complaint, para. 38.]"

"Defendants contend that the second cause of action for defamation is premised on protected activity under the anti-SLAPP statute. . . . Defendants apparently contend that the statement made by Martin off the record with regards to Starflinger being sued by the SEC were made 'in connection with' litigation under CCP § 425.16 because the potential criminal conduct of Starflinger is relevant to his credibility determination.

"Defendants' interpretation of CCP § 425.16 is unsupported and overly broad. To be considered 'in connection' with litigation, a statement must be related to a relevant issue that is actually under consideration by the judicial body, and also be directed to a person actually interested in the litigation. See, e.g. *Paul v. Friedman* (2002) 95 Cal.App.4th 853, 866-867. For example, in *Paul v. Friedman*, the Court of Appeal held that defamatory and embarrassing statements made in a prior arbitration for securities fraud were not made 'in connection' with arbitration or protected by the anti-SLAPP statute because the issue of 'impaired judgment' was irrelevant and 'did not occur in connection with an issue under consideration or review in the arbitration proceeding.' *Id.* There, the arbitration proceedings made no allegations of 'impaired judgment,' and the arbitral decision was likewise barren of any mention of any such claims or arguments.

"Here, like in *Paul*, defendants' allegedly false and defamatory statement that plaintiff Starflinger had been 'sued by the SEC for securities fraud' was not made in connection with the prior action because that issue was irrelevant and unrelated to any issue actually under consideration in the prior action – the issue of being sued by the SEC for securities fraud, or having prior fraud convictions, was not raised in the pleadings or in discovery, and was never submitted to the court for consideration or review. . . . Defendants' argument that the statement affects Starflinger's credibility and therefore would be relevant to the overall determination of the case is not well taken. Even if defendants' statement were true, an accusation of securities fraud brought in civil proceedings would not be admissible for impeachment purposes generally. Defendants have not cited to any case supporting such a broad interpretation of [section 425.16].

"Therefore, defendants have not met their threshold burden of showing that the acts alleged in the second cause of action were taken in furtherance of the defendants' constitutional rights of petition or free speech in connection with a public issue."

Banuelos and the Attorney Defendants filed a timely notice of appeal from the order denying their special motion to strike.

CONTENTIONS

Banuelos contends the trial court erred in denying the special motion to strike because (1) with respect to the malicious prosecution claim, Banuelos had probable cause to bring the underlying action for interference, and LAI failed to make a prima facie showing of malice; and (2) the claim of defamation was not actionable. Banuelos also contends the trial court erred in its evidentiary rulings.

DISCUSSION

I. *General principles regarding a special motion to strike*.

A special motion to strike "involves a two-step process. First, the defendant must make a prima facie showing that the plaintiff's 'cause of action . . . aris[es] from' an act by the defendant 'in furtherance of the [defendant's] right of petition or free speech . . . in connection with a public issue.' (§ 425.16, subd. (b)(1).) If a defendant meets this threshold showing, the cause of action shall be stricken unless the plaintiff can establish 'a probability that the plaintiff will prevail on the claim.' " (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21, fn. omitted.)

On the first prong of the two-part test, in determining whether the anti-SLAPP statute applies, we analyze whether the defendants' (Banuelos and the Attorney Defendants') acts underlying the plaintiffs' (LAI's) causes of action were in furtherance of Banuelos's right of petition or free speech. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 (*Cotati*).)

Appellate review "of an order granting or denying a motion to strike under section 425.16 is de novo. [Citation.] We consider 'the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.' (§ 425.16, subd. (b)(2).) However, we neither 'weigh credibility [nor] compare the weight of the evidence.

Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.' [Citation.]" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

II. *Trial court properly denied defendants' special motion to strike the cause of action for malicious prosecution.*

A. *First prong; defendants met their initial burden to show the malicious prosecution claim arose out of their protected activity.*

The first step of the inquiry is not disputed here. A claim of malicious prosecution "is a cause of action arising from protected activity because every such claim necessarily depends upon written and oral statements in a prior judicial proceeding." (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 215 (*Daniels*).) We therefore proceed to the second prong.

B. *Second prong; plaintiffs met their burden to show a reasonable probability of prevailing on each element of the malicious prosecution claim.*

" 'To establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations].' " (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 676.) A malicious prosecution suit may be maintained even if only some of the claims in the prior action lacked probable cause, notwithstanding that there must first be a favorable termination of the entire underlying action. (*Id*. at p. 686.)

1. *Plaintiffs met their burden to demonstrate a reasonable probability of prevailing on the element of favorable termination.*

There is no dispute that LAI obtained a favorable termination in the underlying action.

2. *Plaintiffs met their burden to show a reasonable probability of prevailing on the claim that defendants lacked probable cause to initiate and maintain the underlying action for interference with sale.*

"If there is ' "no dispute as to the facts upon which an attorney acted in filing the prior action, the question of whether there was probable cause to institute that action is purely legal." [Citation.] 'The resolution of that question of law calls for the application of an *objective* standard to the facts on which the defendant acted." [Citation.]' [Citation.] So, it is often said that 'the existence or absence of probable cause has traditionally been viewed as a question of law to be determined by the court, rather than a question of fact for the jury . . . . [¶] . . . [It] requires a sensitive evaluation of legal principles and precedents, a task generally beyond the ken of lay jurors . . . .' (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 875 (*Sheldon Appel*).) [¶] On the other hand, when there is a dispute as to the state of the defendant's knowledge and the existence of probable cause turns on resolution of that dispute, there becomes a fact question that must be resolved before the court can determine the legal question of probable cause. (See *Sheldon Appel*, *supra*, 47 Cal.3d at p. 881 ['[T]he jury must determine what facts the defendant knew . . . .'].)" (*Lanz v. Goldstone* (2015) 243 Cal.App.4th 441, 462.)

Here, the evidence showed that Rodriguez's application to purchase Banuelos's mobile home indicated Rodriguez had a debt-to-income ratio of over 125 percent, nowhere close to qualifying under the Park's written criteria, which did not permit a debt ratio higher than 41 percent. Based on this high debt ratio, this court previously determined that "LAI [was] well within [its] rights in demanding that the prospective purchaser located by [Banuelos] provide satisfactory evidence of an ability to pay the required park rent and charges. Civil Code section 798.74 allows park owners to refuse to approve mobile home purchasers for residency based on their 'lack of ability to pay park rent and charges.' " (*Banuelos I*, slip opn., p. 9.) Instead of supplying the requested documentation, which had been duly requested by LAI, Rodriguez withdrew from the transaction. In light of the above, LAI demonstrated a probability of prevailing on its

claim that Banuelos lacked probable cause to allege that LAI interfered with the contract by demanding "excessive documentation" from Rodriguez and that LAI "unreasonably, intentionally and wrongfully refused to approve the application of Rosa Rodriguez for residency."

Further, the evidence showed that Banuelos was aware, *before* she filed the underlying action for interference with sale, of the reason LAI requested additional financial information from Rodriguez. On July 15, 2010, five days before Banuelos filed suit for interference with sale, Banuelos executed a declaration in the *Kevin* action that attached a letter by Douglas Beck, the attorney for the park owners, to Rodriguez concerning her residency application; the Beck letter explained to Rodriguez that the park owners needed additional information to evaluate her application because her credit report showed she had mortgage debt in excess of $850,000 and significant monthly payments, and that she reported rental income of only $2,800. Also, the Banuelos declaration in the *Kevin* action indicated that it was Rodriguez who "backed out of the transaction." These circumstances, i.e., that Banuelos knew that Rodriguez was a questionable buyer and that Rodriguez had withdrawn from the transaction rather than supplying the requested financial information, are prima facie evidence that Banuelos lacked probable cause to sue for interference with sale.

The underlying action also included the claim by Banuelos that LAI engaged in a pattern and practice of unreasonably refusing to approve the transfer of mobile homes to anyone other than LAI and its proxies, in order to compel mobile home owners, including Banuelos, to sell their mobile homes to LAI and its proxies for less than fair market value. In opposing the special motion to strike, LAI presented evidence that the only evidence of such an alleged pattern of abuse was that more than five years before 218 Properties purchased the park, a single homeowner had difficulty in finding a buyer whose application would be approved; LAI's evidence showed, moreover, that the homeowner ultimately was able to sell to an approved buyer who paid $1,000 more than two previous applicants who had been declined. These facts, if credited by a trier of fact, would support a finding that Banuelos lacked probable cause to allege that LAI's failure

to approve Rodriguez's application was part of an overall scheme to force owners to sell their mobile homes to LAI at depressed prices.

(a) *Banuelos's contentions with respect to probable cause lack merit*.

(1) *Banuelos's assertion she relied on advice of counsel does not establish she had probable cause as a matter of law.*

In seeking reversal of the order denying her special motion to strike the malicious prosecution claim, Banuelos contends she had probable cause to file the interference claim against LAI because she relied on the advice of counsel. In this regard, Banuelos's declaration stated, "In the middle of July 2010, I had a conversation with my attorney who told me that he thought that I had a case against the Park for making problems with the sale. I trusted him and relied on his advice in authorizing the filing of my lawsuit against the Park." We conclude Banuelos is not entitled to an early dismissal based on her invocation of the advice of counsel defense.

" 'Reliance upon the advice of counsel, *provided it is given in good faith and is based upon a full and fair statement of the facts by the client*, may afford the latter a complete defense to an action for malicious prosecution.' " (*Albertson v. Raboff* (1960) 185 Cal.App.2d 372, 386, italics added (*Albertson*).) Reliance on the advice of counsel is an affirmative defense and the burden of establishing it rests on the defendant in an action for malicious prosecution. (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 54 (*Bertero*).) Because a special motion to strike should be granted if the defendant presents evidence that defeats the plaintiff's claim as a matter of law, a defendant may defeat a cause of action *either* by showing that the plaintiff cannot establish an element of its cause of action *or* by showing there is a complete defense to the cause of action. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 676.) A defendant who advances an affirmative defense on a special motion to strike properly bears the burden of proof on the defense. (*Ibid.*) A special motion to strike "should be granted if the defendant presents evidence *that defeats the plaintiff's claim as a matter of law*." (*Ibid*., italics added.)

Here, as in *Bertero*, "the record does not establish that as a matter of law defendants must prevail on this defense." (*Bertero, supra,* 13 Cal.3d at p. 54.) In that case, there was evidence that the defendants in the prior action harbored deep feelings against Bertero, so as to call into question whether there was good faith reliance on the advice of counsel. (*Ibid*.) In the instant case, as discussed below, there is evidence supporting an inference of malice on Banuelos's part. Therefore, whether Banuelos relied in good faith on the advice of counsel is a question of fact which cannot be resolved at this stage of the proceedings.

(2) *No merit to Attorney Defendants' argument that Starflinger's "bragging" established they had probable cause to maintain the underlying action.*

To show the underlying action was supported by probable cause, the Attorney Defendants principally rely on the deposition testimony of Harry Madera, Banuelos's listing agent, that Starflinger bragged he would make it difficult for Banuelos to sell her property. Madera testified that Starflinger told him that he, Starflinger, "wasn't going to make it easy" for Banuelos to sell her property. Citing this remark, the Attorney Defendants contend that "a reasonable attorney would believe that probable cause for sale interference was present when Madera reported Starflinger's bragging" that he would make it difficult for Banuelos to sell her property. The Attorney Defendants' argument is unpersuasive in light of the absence of evidence that Starflinger obstructed a sale to a qualified buyer.

It is settled that malicious prosecution includes "continuing to prosecute a lawsuit discovered to lack probable cause." (*Zamos, supra,* 32 Cal.4th at p. 973.) Therefore, leaving aside whether the *Attorney Defendants* had probable cause to *initiate* the underlying action against LAI based on Starflinger's "bragging," the issue remains whether the Attorney Defendants had probable cause to continue prosecuting that action for another three years. As indicated, the evidence showed, inter alia, Rodriguez's residency application put in issue whether she was a qualified buyer, and that instead of supplying the additional financial information that had been requested, Rodriguez backed out of the transaction. Further, Banuelos did not submit any other evidence to show

Starflinger obstructed a sale to a qualified buyer. Therefore, Starflinger's "bragging" that he would make it difficult for Banuelos to sell her property, without more, does not establish that the Attorney Defendants had probable cause to continue litigating the underlying action for interference with sale for a period of three years.

(3) *Banuelos's reliance on the outcome of other litigation against Banuelos's son to show probable cause in the underlying action is misplaced.*

Banuelos contends the final judgment in an eviction action by the park owners against her son Kevin Banuelos establishes probable cause for the underlying action by Banuelos against LAI for interference with sale. The argument is meritless.

The eviction action was an unlawful detainer proceeding by 218 Properties against Kevin Banuelos. The jury therein returned a defense verdict, which included special findings that 218 Properties or its agents unreasonably refused to approve Kevin Banuelos's tenancy, discriminated against him, had substantial motivation to retaliate against him, acted in bad faith towards him, and waived any breach by him. That judgment was affirmed by the Appellate Division.

The favorable judgment in the eviction action (to which Rosa Banuelos was not a party) is not relevant to the probable cause determination here. Evidence that LAI unreasonably refused to approve Kevin Banuelos's tenancy does not supply probable cause for Rosa Banuelos's claim that LAI interfered with her sale to Rodriguez, who appeared to be a patently unqualified purchaser and who withdrew from the transaction. Thus, the jury's determination in the eviction action that LAI improperly rejected Kevin Banuelos's tenancy does not supply probable cause for Rosa Banuelos's claim that LAI interfered with her sale to Rodriguez.[5]

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[5] We also note that in bringing the special motion to strike, the defendants did not submit transcripts of testimony from the eviction action or other evidence underlying the verdict in the eviction action to support their claim that the eviction action somehow showed probable cause for Banuelos's action. To the extent that defendants included various materials related to the eviction action in their reply papers below, the trial court disallowed the reply papers as untimely, and defendants do not show any error in that regard.

3. *LAI met its burden to demonstrate a reasonable probability of prevailing on the element of malice with respect to both Banuelos and the Attorney Defendants.*

LAI also satisfied its burden with respect to the element of malice.[6] " 'Since parties rarely admit an improper motive, malice is usually proven by circumstantial evidence and inferences drawn from the evidence.' [Citation.]" (*Daniels, supra,* 182 Cal.App.4th at p. 225.) A lack of probable cause may be considered in determining whether the claim was prosecuted with malice, but the lack of probable cause must be supplemented by other, additional evidence. (*Ibid*.)

Here, in addition to making out a prima facie showing that the underlying action was unsupported by probable cause, LAI presented evidence of the Attorney Defendants' "actual hostility or ill will." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1157.) The declaration of Douglas Beck, counsel for LAI, stated that Martin told him that she and Spix "both detest my client," that she and Spix had joked that Starflinger's father "lost his hands in the war when they were caught in the oven door in a concentration camp," and that Spix taunted Beck with statements such as "how many people's equity have you stolen today?" Thus, a trier of fact could conclude the Attorney Defendants were motivated by malice.

A trier of fact could also conclude that Banuelos acted with malice in that she brought the underlying action with an ulterior motive. Banuelos's declaration in support of the special motion to strike supports the inference that she brought the underlying action solely to pressure LAI to approve her proposed buyer: In that declaration, Banuelos stated that after she accepted another offer and the escrow closed, she attempted to settle the case "[s]ince I had achieved most of what I wanted by the lawsuit."

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[6] As stated in *Downey Venture v. LMI Ins. Co*. (1998) 66 Cal.App.4th 478, 494, "[t]he 'malice' element . . . relates to the *subjective intent or purpose* with which the defendant acted in initiating the prior action. [Citation.] The motive of the defendant *must have been something other than that of . . . the satisfaction in a civil action of some personal or financial purpose.* [Citation.] The plaintiff must plead and prove actual ill will *or* some *improper* ulterior motive." (Certain italics added.)

We conclude LAI met its burden to make a prima facie showing with respect to the element of malice as to both Banuelos and her counsel.

For all these reasons, the trial court properly denied defendants' special motion to strike LAI's cause of action for malicious prosecution.

III. *Trial court erred in denying the special motion to strike the cause of action for defamation; the defamation claim arose out of defendants' protected activity in the* Kevin *action and plaintiffs did not show a probability of prevailing on said claim.*

We now turn to the cause of action for defamation. The threshold issue is whether this cause of action is based on activity protected under section 425.16. As explained, the defamation claim was based on protected activity.

A. *First prong; defendants met their threshold burden to show the defamation claim arose out of protected activity.*

The instant complaint alleged in relevant part that in June 2013, Martin accused Starflinger "of being '*sued by the SEC for securities fraud*.' Defendant Martin made this statement in the presence of other third parties, including but not limited to, Douglas Beck, Kevin Banuelos, and a court reporter." The statement allegedly was false in that Starflinger "has never been sued by the SEC for securities fraud. In reality, the SEC action to which Defendants referred (i.e., *SEC v. High Park*) was actually brought by another party who defrauded . . . Starflinger's clients, and [he] merely joined the SEC action for the sole purpose of assisting his clients and in opposing a motion by the receiver to invalidate his clients' liens against the actual defendants."

In bringing the special motion to strike, Banuelos contended the alleged statements merely opined as to Starflinger's credibility, were not defamatory, and further, the defamation claim was barred by the litigation privilege. Specifically, in a declaration in support of the special motion to strike, Martin explained the context of her statement regarding Starflinger. While off the record at the deposition of Kevin Banuelos in a case brought by him, counsel discussed the credibility of the parties to the case. In that regard, after counsel for Starflinger commented on the credibility of Kevin Banuelos, Martin, who was counsel for Kevin Banuelos, discussed the credibility of

Starflinger based on her understanding that Starflinger had been named as a defendant in securities fraud litigation.

In opposition to the special motion to strike, LAI submitted the declaration of its attorney, Douglas Beck, who stated: Martin's statement accusing Starflinger of having been sued by the SEC for securities fraud was made in a conference room at the office of a court reporter, while Beck was packing up following the completion of the deposition of Kevin Banuelos. The conference room door was open and persons in the room across the hall and in the adjacent waiting room could hear what was being said.

In refusing to strike the defamation claim, the trial court stated "defendants have not met their threshold burden of showing that the acts alleged in the second cause of action were taken in furtherance of the defendants' constitutional rights of petition or free speech in connection with a public issue." As explained below, the trial court's ruling was erroneous.

As used in section 425.16, an " 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing *made in connection with an issue under consideration or review by a* legislative, executive, or *judicial body*, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e), italics added.)

Evidence relating to witness credibility is relevant in an action. (Evid. Code, §§ 210, 780; *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1356-1357.) In addition, the credibility of witnesses is a factor frequently considered and discussed by counsel in connection with settlement discussions. In light of the relevance of credibility in the evaluation of a case, Kevin Banuelos's attorney's statement that Starflinger had been

charged with securities fraud, so as to call into question Starflinger's credibility, was made in connection with an issue that was under consideration in that action as that litigation went forward.

Paul v. Friedman (2002) 95 Cal.App.4th 853 (*Paul*), on which plaintiffs place particular emphasis, is inapposite. There, an attorney moved to strike causes of action asserted by a securities broker alleging that the attorney, in litigating a prior arbitration proceeding, had conducted an intrusive investigation into the broker's personal life and had disclosed to the broker's clients and others personal details, including details about the broker's financial affairs, spending habits, tax liabilities, and close personal relationship with another individual, that had no bearing on the alleged securities fraud at issue in the arbitration. (*Id*. at pp. 857-858.) The attorney argued, inter alia, that his conduct was protected because it was undertaken "in connection with" the arbitration proceeding. (*Id*. at p. 864.) *Paul* held that the attorney had failed to satisfy his threshold burden to show the activity was protected. (*Id*. at p. 868.) Section 425.16 "does not accord anti-SLAPP protection to suits arising from any act having any connection, however remote, with an official proceeding. The statements or writings in question must occur in connection with 'an issue under consideration or review' in the proceeding." (*Id*. at p. 866.) The attorney's investigations into and disclosures of the broker's private information were unrelated to any issue under consideration in the arbitration proceeding. (*Id.* at pp. 867-868.) Thus, although the attorney's conduct might have been " 'in connection with' " a proceeding, it was not -- as section 425.16, subdivision (e)(2) requires – "in connection with an issue under consideration or review" in that proceeding. (*Id*. at pp. 867, 868.)

In the instant case, Martin's statement, at the close of Kevin Banuelos's deposition, that Starflinger had been "sued by the SEC for securities fraud" went to Starflinger's credibility, which would be a central issue in that action. Therefore, it cannot be said that Martin's statement bore no relationship to the claims under consideration in that litigation.

In sum, the moving papers met their threshold burden to show the plaintiffs' cause of action for defamation was subject to a special motion to strike.

B. *Second prong; plaintiffs failed to establish a probability of prevailing on the merits on their defamation claim, which is barred by the litigation privilege.*

The litigation privilege, which is absolute in nature, immunizes defendants from tort liability for defamation, and indeed for all tort suits other than claims for malicious prosecution. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 215-216 (*Silberg*).) As with the anti-SLAPP statute, courts broadly construe the litigation privilege to protect a litigant's right to access to the courts without fearing subsequent harassing derivative tort actions. (*Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 37; *Silberg*, *supra*, at p. 213.) The privilege is generally described as applying to "any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Silberg*, *supra*, at p. 212.) Plaintiffs' arguments that the elements of this defense were not established are unpersuasive.

Plaintiffs assert the first element of the litigation privilege was not satisfied because the statements were made outside of court, after the deposition of Kevin Banuelos had ended. The argument lacks merit. The challenged statements occurred "at the conclusion" of the deposition and concerned Starflinger's credibility, which was relevant to an overall evaluation of the case. The timing of the statements, at the end of the deposition session, does not support the conclusion that the statements were not made in a judicial proceeding. The statements were made by a party's attorney to counsel for the opposing party, in the context of discovery. The litigation privilege "applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, *even though the publication is made outside the courtroom and no function of the court or its officers is involved*." (*Silberg*, *supra*, 50 Cal.3d at p. 212, italics added.)

Next, plaintiffs contend the litigation privilege does not apply because the statements were not made between party litigants but instead were made in the presence

of strangers to the action. The argument fails. The fact that bystanders may have overheard the statements made in the deposition conference room does not take this fact situation outside the litigation privilege. This is a far cry from a situation in which communications are made to the press or general public about ongoing litigation. (See, e.g. *Rothman v. Jackson* (1996) 49 Cal.App.4th 1134, 1138 [challenged statements were made by the defendants in a press conference]; *Susan A. v. County of Sonoma* (1991) 2 Cal.App.4th 88, 92-93 [psychologist interviewed 14-year-old boy who was accused of attempted murder and then made statements about the boy to the press].)

Finally, plaintiffs contend the statement accusing Starflinger of securities fraud had no logical connection to the Rosa Banuelos litigation. The argument is meritless because Martin's statement was made in the context of a lawsuit brought by Kevin Banuelos, not in Rosa Banuelos's lawsuit against the park owners. Further, as already discussed, the credibility of Starflinger, or of any witness, was plainly an issue in that action. Therefore, we reject plaintiffs' assertion that the statement had no logical connection to the litigation.

For these reasons, we conclude plaintiffs failed to show a reasonable probability that their defamation claim could withstand the litigation privilege.[7] Therefore, with respect to the defamation claim, defendants were entitled to a grant of their special motion to strike.

IV. *Attorney fees.*

Because defendants are now partially prevailing parties, having prevailed with respect to the defamation claim, the issue is whether they are entitled to attorney fees. (§ 425.16, subd. (c)(1).)

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[7] Because the defamation claim is barred by the litigation privilege, it is unnecessary to address defendants' contention that the defamation claim is also barred by the common interest privilege. (Civ. Code, § 47, subd. (c).)

In addition, because the litigation privilege defeats the defamation claim, it is also unnecessary to address whether Martin's codefendants could be held liable for Martin's statements concerning Starflinger.

"Defendants . . . are entitled to recover attorney fees and costs incurred in moving to strike the claims on which they prevailed, but not fees and costs incurred in moving to strike the remaining claims." (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1020.)

However, defendant Rosa Banuelos, as a self-represented nonattorney litigant, cannot recover an award of attorney fees for the time and effort she expended in litigating this matter. (*Trope v. Katz* (1995) 11 Cal.4th 274, 285-286 (*Trope*).)

The remaining issue is whether the Attorney Defendants are entitled to recover attorney fees for their success in striking the defamation claim. "The teaching of *Trope* and its progeny is that law firms and attorney litigants are precluded from recovering attorney fees for self-representation. [Citations.]" (*Soni v. Wellmike Enterprise Co. Ltd.* (2014) 224 Cal.App.4th 1477, 1488.) On the other hand, "attorney litigants who retain other attorneys to represent their personal interests may recover attorney fees, just like nonattorney litigants." (*Ibid*.)

In this matter, defendant Spix was counsel for defendant Martin as well as for the defendant law firm, Spix & Martin; Martin, in turn, was counsel for Spix as well as for Spix & Martin. In seeking attorney fees in the undifferentiated sum of $37,380 on the special motion to strike, Spix's declaration stated: "Although both I and my partner, D. Martin worked on this action, I believe that no unreasonable duplication resulted from that circumstance. We divided tasks so that we were not engaged in the same activity. At all material times we tried to avoid unnecessary duplication and to carefully coordinate our activities." Spix's assertion that he and Martin did not duplicate their efforts did not speak to the critical issue of whether the Attorney Defendants, i.e., Spix, Martin, and Spix & Martin, retained other attorneys to represent their interests. Assuming arguendo that Spix represented Martin and that Martin represented Spix, the Attorney Defendants failed to make a showing below that either individual attorney incurred or was responsible for any attorney fees apart from the firm, or that either individual attorney incurred any discrete attorney fees. Further, insofar as the firm of Spix & Martin was represented by its own principals, recovery of fees by the firm is

barred under the rule of *Trope*, *supra*, 11 Cal.4th 274. For these reasons, the Attorney Defendants are not entitled to recover any attorney fees, notwithstanding their partial success on the special motion to strike.

V. *Evidentiary issues.*

Banuelos contends the trial court engaged in a "robotic exclusion" of the reply papers. The record reflects the trial court disallowed Banuelos's reply papers on the ground they were due by October 9, 2014, but were not filed and served until October 14, just three days before the hearing. Banuelos has not shown the trial court abused its discretion in declining to consider the untimely reply papers.

Banuelos also argues, without any specificity, that the trial court erred in failing to rule on her motions in limine to strike portions of Beck's declaration, and in finding her evidence to be without foundation. Banuelos has not framed the argument in accordance with Evidence Code sections 353 (erroneous admission of evidence) and 354 (erroneous exclusion of evidence). Further, Banuelos has not shown that but for any evidentiary error, she would have obtained a more favorable result on the special motion to strike. Therefore, this argument requires no discussion.

DISPOSITION

The order denying the special motion to strike is reversed in part and the matter is remanded with directions to grant the motion as to the defamation claim, and is otherwise affirmed. The parties shall bear their respective costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

HOGUE, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.